IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-5961

TRANSAMERICAN PRESS, INC.,
d/b/a OVERDRIVE,

Petitioner,

vs.

GEORGE T. APPLEYARD, III,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner, Transamerican Press, Inc., d/b/a Overdrive ("Overdrive"), respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit entered on August 5, 1976.

OPINION AND JUDGMENT BELOW

The opinion of the Court of Appeals, not yet reported, is attached as Appendix A. The judgment of the United States District Court for the Middle District of North Carolina, not reported, is attached as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is evidence by a public figure plaintiff that an alleged libelous article was false together with knowledge of falsity by an employee of the publisher, who had interests adverse to the publisher, sufficient evidence of actual malice to warrant submission of the case to the jury on the issue of liability?

2. May punitive damages be awarded to a public figure plaintiff?

3. Did the exercise of *in personam* jurisdiction by a North Carolina court over a small magazine publisher with limited circulation and advertising in North Carolina offend the due process clause of the fourteenth amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the first and fourteenth amendments, United States Constitution, amendment I, amendment XIV, § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., amend. I.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1.

STATEMENT

A. FACTS

Petitioner is the publisher of *Overdrive*, a magazine for truckers. This action alleges libel arising out of the January 1972 issue of *Overdrive*.

The respondent, Appleyard, originally came in contact with Michael Parkhurst, the editor of *Overdrive*, in connection with *Overdrive's* efforts to change certain Interstate Commerce Commission ("ICC") regulations. After several conversations, Parkhurst and Appleyard agreed that Appleyard would drive a truck loaded with goods prohibited by ICC regulations from Winston-Salem, North Carolina, to the office of the ICC in Washington, D. C. Anticipating that these actions by Appleyard would force the ICC into a test case, *Overdrive* agreed to finance the expenses of Appleyard in defending this litigation from a defense fund previously established by *Overdrive*. Appleyard drove to Washington as agreed, and the event was reported by a writer and photographer employed by *Overdrive*.

Disagreements arose later between Appleyard and *Overdrive* concerning the particular attorney who would represent Appleyard in the case brought by the ICC. As a result of these disagreements, Appleyard set up a legal fund separate from that previously established by *Overdrive* to finance the litigation. Later, Appleyard wrote and published letters in other national magazines. One letter, commenting on his dispute with *Overdrive*, suggested that *Overdrive* had committed "a fraudulent act."

Thereafter, the January 1972 issue of *Overdrive* contained two articles written by Parkhurst concerning Appleyard, parts of which Appleyard contends were libelous. These articles are attached as Appendix C. The one statement

in the articles which formed the basis for the Court of Appeals' decision was:

> . . . Appleyard had caused the alteration of an appeal for funds in *Overdrive* so that donations for the entire Legal Defense Fund would be channeled to a special bank account Appleyard had set up.

B. PROCEEDINGS IN THE DISTRICT COURT

In March, 1972, Appleyard, alleging that the January 1972 issue of *Overdrive* libeled him, filed suit in the United States District Court for the Middle District of North Carolina. Prior to answering, *Overdrive* moved to dismiss the action for lack of *in personam* jurisdiction. In support of its motion to dismiss for lack of jurisdiction, *Overdrive* presented evidence showing that: *Overdrive* is a national magazine, with limited circulation to persons interested in the trucking business; the total monthly circulation of *Overdrive* in North Carolina is 765 copies as compared to a monthly nationwide circulation of 56,643 copies; the total yearly billing for advertising in *Overdrive* is $292,000.00, only $517.00 of which is attributable to advertisers in North Carolina; and solicitations for subscriptions and advertisements are conducted by two full-time employees of *Overdrive* by mail and by telephone outside of North Carolina. However, this motion was denied by the District Court. *Overdrive* then answered, raising defenses of truth, fair comment, privilege, and lack of actual malice.

Prior to trial, Appleyard conceded that he was a "public figure" within the context of the facts of the case.

At the trial, Appleyard's testimony concerning the alteration was that it was not made by him, at his direction or with his agreement. However, he admitted that before the altered article was to be printed, he received a long-distance telephone call from Jim Drinkhall, an employee of *Overdrive*,

and that Drinkhall informed Appleyard of the alteration. Appleyard also testified that though he opposed the alteration he did nothing to stop it. Appleyard further related that at the same time of this conversation, he had several other conversations with Drinkhall about starting another magazine in competition with *Overdrive*. Finally, Appleyard indicated that one possible reason the alteration was being made was to make Mr. Parkhurst mad or "to jab at him." No additional evidence was introduced by Appleyard concerning *Overdrive's* knowledge of the alteration.

Concerning the alteration, Parkhurst testified as follows:

> Q And, Mr. Parkhurst, am I correct in saying that in that affidavit you stated in Paragraph 7, "In 1970, an advertisement in *Overdrive* magazine was changed so as to direct money for the *Overdrive* Legal Defense Fund to the plaintiff's [respondent's] Defense Fund."
>
> A The offense [office] was informed by Jim Drinkhall, an employee of *Overdrive*—that the plaintiff [respondent] had been informed of the alteration but made no effort to correct the alteration.

Parkhurst also testified that he believed the articles were true at the time they were published.

At the close of Appleyard's evidence and at the close of all the evidence, *Overdrive* moved for a directed verdict pursuant to Rule 50, both of which motions were denied. The jury, finding that the statements complained of were false and were published with actual malice, awarded Appleyard $10,000 actual damages and $75,000.00 punitive damages. After the jury verdict, *Overdrive* moved for judgment notwithstanding the verdict pursuant to Rule 50(b), or for a new trail pursuant to Rules 50(b) and 59(a), which motions were

also denied. However, the District Court remitted the punitive damages award to $5,000.00

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals, in affirming the District Court's judgment, ruled that there was *in personam* jurisdiction, that there was sufficient evidence of actual malice to submit the case to the jury, and that it was proper for a jury to award punitive damages to a public figure plaintiff.

On the question of *in personam* jurisdiction, the Court found that the due process clause of the fourteenth amendment was satisfied by *Overdrive's* "contacts" with the state. The Court stated that monthly distribution in North Carolina of 765 magazines from a total distribution of 56,643 together with the fact that the articles were directed at a North Carolina resident was sufficient.

Acknowledging Appleyard's concession that he was a public figure at the time the libel occurred, the Court found "clear and convincing evidence of actual malice" to warrant submitting the case to the jury on the issue of liability. This finding of actual malice was based on the previously identified statement concerning alteration of the advertisement directed to an appeal for funds and was confined to the following statement in the Court's opinion: "Appleyard testified that he was first informed of the proposed alteration by Jim Drinkhall, an employee of *Overdrive*, and that at that time he expressed his opposition to the change. This testimony provides sufficient support for the jury's general finding that Transamerican published the articles and statements complained of by plaintiff [respondent] . . . with actual malice as that term was defined in the instruction . . . ."

On the issue of punitive damages, the Court held that as long as Appleyard met "the *New York Times* test" of malice

for liability, he was also entitled to have the jury consider punitive damages. Finally, the Court held that the punitive damage award was not so excessive as to have "an inherent chilling effect" on *Overdrive's* first amendment rights.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is based on two legal principles, both of which are contrary to *New York Times* and subsequent decisions of this Court construing *New York Times*. First, the Court of Appeals implies that the knowledge of an employee of *Overdrive* who had interests adverse to *Overdrive*, could be imputed to *Overdrive* to establish "knowledge of falsity" by *Overdrive*. Second, the Court of Appeals held that there was clear and convincing evidence that *Overdrive* published the articles complained of with "actual malice" when Appleyard offered no evidence that *Overdrive* had reason to doubt the truth of the articles.

Both of these findings are factually and legally incorrect and contrary to this Court's previous decisions. If the decision of the Court of Appeals stands based on the evidence in this case, this Court will approve the Court of Appeals' holding that the knowledge of an employee with adverse interests to his principal may be imputed to that principal; that "actual malice" may be inferred from spite or ill will; and that "actual malice" may be inferred if the jury finds that the publications were false, all of which have been rejected as a basis for "actual malice."

Finally, a review of the decision of the Court of Appeals is also required since it severely limits *Overdrive's* freedoms guaranteed under the first amendment.

In *New York Times*, this Court stated that a public official could not recover damages for defamatory comments about

his official conduct unless

> . . . he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.
>
> 376 U.S. at 279-280.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), this requirement was extended to public figures such as Appleyard.

In *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), the proof of actual malice was required to be "clear and convincing." In effect, the Court of Appeals rejected the holdings in these cases in reaching its decision in this case.

The Court of Appeals' decision also limits the first amendment rights of *Overdrive* by subjecting it to the jurisdiction of a North Carolina court under these facts. This Court's requirement in *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945), that a defendant have such contact with the forum state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' " was not followed by the Court of Appeals. In jurisdictional issues involving first amendment rights, the "minimum contacts" required should be more substantial than those cases involving other types of tortious injury.

I. APPLEYARD DID NOT INTRODUCE SUFFICIENT EVIDENCE OF "ACTUAL MALICE" TO WARRANT SUBMISSION OF THE CASE TO THE JURY ON THE ISSUE OF LIABILITY.

The Court of Appeals found that there was sufficient evidence to warrant submission of the case to the jury on the issue of liability based on the following analysis:

> Appleyard concedes that he was a public figure at the time that the alleged libel took place. Thus, in order to support the jury's verdict, there must be clear and convincing evidence of actual malice — that is, knowledge of the falsity of statements in the articles or reckless disregard of their truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
>
> One of the statements in the *Overdrive* articles was that "Appleyard had caused the alteration of an appeal for funds in OVERDRIVE, so that donations for the *entire* Legal Defense Fund would be channeled to a special bank account Appleyard set up." (Emphasis in original.) Appleyard testified that he was first informed of the proposed alteration by Jim Drinkhall, an employee of *Overdrive*, and that at that time he expressed his opposition to the change. This testimony provides sufficient support for the jury's general finding that Transamerican published the "articles and statements complained of by plaintiff . . . with actual malice as that term was defined in the instruction," i.e., with either knowledge that the statements were false or reckless disregard for their truthfulness.

The petitioner requests that the basis of the judgment of the District Court and decision of the Court of Appeals be reviewed and determined insufficient factually and legally as was done in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), and *Time, Inc. v. Pape*, 401 U.S. 279 (1971).

The Court of Appeals infers actual malice or knowledge of falsity from the imputed knowledge of Drinkhall. Such a conclusion ignores other evidence concerning Drinkhall's relation with *Overdrive* during the period of the publication. Appleyard testified that he and Drinkhall had discussed starting another magazine which would compete with *Overdrive*. Appleyard also testified that the alteration was being

made to anger Parkhurst, the owner and editor of *Overdrive*. Under these facts, the interests of Drinkhall were adverse to those of *Overdrive*, and his knowledge cannot be imputed to *Overdrive* to establish knowledge of falsity.

In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), this Court stated that knowledge of a reporter who was acting within the scope of his employment would be imputed to his employer-publisher "under traditional doctrines of respondeat superior." The same principles of agency negate imputation of Drinkhall's knowledge to *Overdrive* under these facts.

In *American Surety v. Pauly*, 170 U.S. 133 (1898), it was held that where the agent acts or makes declarations not to carry out any duty he owes to the principal but simply to serve his personal interest or to commit a fraud against the principal, the agent's knowledge cannot be imputed to the principal. This holding describes the position of Drinkhall at the time of his discussion with Appleyard. As Appleyard testified, the alteration was done to anger Parkhurst. Additionally, Drinkhall was considering competing with *Overdrive* through the formation of another magazine. Drinkhall was, therefore, furthering his own personal interests which were adverse to and in conflict with the interests of *Overdrive*.

Under these circumstances, whatever knowledge was possessed by Drinkhall but not communicated to Parkhurst cannot be imputed to *Overdrive*. Without this imputed knowledge, the only basis for actual malice is *Overdrive's* ill will and the statement that "Appleyard had caused the alteration." Since the statement was based on the fact that Appleyard knew of the alteration, there is no proof of actual malice. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

Appleyard's direct testimony was simply that the articles were false and that some ill will existed between him and *Overdrive*. Parkhurst testified that Drinkhall told him that Appleyard knew of the alteration and did nothing to stop it. There was no indication that Drinkhall told Parkhurst that Appleyard opposed the alteration. Without more, Parkhurst had no reason to doubt the truth of his publication.

In *Garrison v. Louisiana*, 379 U.S. 64 (1964), this Court rejected the inference of actual malice from any spite or ill will between the parties. Further, in *St. Amant v. Thompson*, 390 U.S. 727 (1968), this Court held that there must be sufficient facts to infer that the publisher entertained "serious doubts as to the truth of his publication." Mere falsity and the libelous nature of the article is not a sufficient basis for inferring malice. *Henry v. Collins*, 380 U.S. 356 (1965).

In *Beckley Newspapers Corp. v. Hanks, supra*, this Court held that testimony of the publisher that he believed the articles were true together with facts showing a failure to make a prior investigation was not sufficient evidence to present a jury question on the issue of liability. In *Time, Inc. v. Pape*, 401 U.S. 279 (1971), this Court also held that ambiguous interpretations of factual material in an article did not create a jury issue of malice. As this Court stated in *Pape*, and as is equally true with the *Overdrive* articles, submission of the case to the jury would be basing liability not on evidence of malice, but on possible errors in judgment or interpretation.

Here, Drinkhall told Parkhurst that Appleyard knew of the alteration but had done nothing to correct it. The article stated that "Appleyard had caused the alteration." The article was nothing more than a comment on the report by Drinkhall to Parkhurst and was based upon facts. Without more, this evidence did not offer the clear and convincing

proof necessary to find actual malice and warrant submission of the case to the jury on the issue of liability.

II. APPLEYARD, A PUBLIC FIGURE PLAINTIFF, IS NOT ENTITLED TO RECOVER PUNITIVE DAMAGES.

The Court of Appeals overlooks the "chilling effect" of the jury award of $75,000.00 as punitive damages. With the stipulation that Appleyard was a "public figure plaintiff" and in view of Appleyard's prior access to and use of other media to publicize his dispute with *Overdrive*, Appleyard had no valid grounds to complain about damages, especially since his evidence showed he sustained no out-of-pocket losses. The Court of Appeals justified an award of punitive damages under the facts of this case by the following statements:

> This is not a case in which the punitive damage award was excessive in relation to the potential harm inherent in the libelous articles. Such a case might raise first amendment problems because of the inherent chilling effect of such disproportionate awards on vigorous criticism of public officials. *See* Rosenbloom v. Metromedia, Inc., 403 U. S. at 74-75 (Harlan, J., dissenting.) Here, punitive damages amounted to only one-half of compensatory damages. We see no constitutional infirmity in such an award.

Under the specific facts of this case, Appleyard was not entitled to have an issue of punitive damages submitted to the jury. Here, Appleyard not only had equal access to the media to counter any statements about him, but he took advantage of this opportunity and published comments and arguments concerning *Overdrive's* statements. Appleyard voluntarily elected to become a "public figure," knowing that publicity would follow.

The appropriateness of punitive damages under these facts necessarily involves a balancing between the state's interest in protecting an individual's reputation and the constitutional guarantee of freedom of press. However, when an individual such as Appleyard freely chooses to participate publicly in a national news event and then also freely chooses to continue to utilize the advantages of the national media, the state's interest should be outweighed by the constitutional guarantees to *Overdrive*. Such a result was recognized in *Maheu v. Hughes Tool Company*, 384 F. Supp. 166 (C.D. Cal. 1974), and by the separate opinions of Justices Marshall and Stewart in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), and should be adopted by this Court.

III. SUBJECTING *OVERDRIVE* TO THE JURISDICTION OF A NORTH CAROLINA COURT OFFENDS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In *International Shoe*, this Court held that a foreign corporation could be subjected to the jurisdiction of another state only if the corporation had sufficient "minimum contacts" with that state to satisfy the due process requirements of the fourteenth amendment. Also, a determination of whether due process is satisfied is dependent on the "quality" and "nature" of the foreign corporation's activities with the forum state.

A monthly circulation of 765 copies and a yearly advertising income of $517.00 do not satisfy the "minimum contacts" requirement and do not show a sufficient quality and nature of business by *Overdrive* with North Carolina to require *Overdrive* to defend the present action. Mathematically, the circulation in North Carolina is 1% of the total and the advertising revenue is .1% of the total. These percentages

are minimal in light of the small circulation and advertising of *Overdrive*.

Even if these contacts would be enough to subject a foreign corporation to jurisdiction in an action for tort, they should be insufficient to sustain jurisdiction when first amendment freedoms are involved. In *NAACP v. Button*, 371 U.S. 415 (1963), and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), this Court recognized the superior rights under the first amendment in order that the exercise of those freedoms would not be impeded. If jurisdiction is sustained under these facts, it would place a heavy burden on a relatively small publication. *Overdrive* would avoid the problem only by restricting its circulation.

In *New York Times Company v. Connor*, 365 F.2d 567 (5th Cir. 1966), the first amendment rights of the *New York Times* were held superior to the interests of Alabama in asserting jurisdiction over the *New York Times*. Here, the court recognized that sustaining jurisdiction under such facts would "limit the circulation of information" and "freeze out of existence" circulation of unpopular ideas. 365 F.2d at 573.

CONCLUSION

This case presents questions of paramount public importance. The opinion of the Court of Appeals severely dilutes this Court's position on actual malice. If the Court of Appeals' decision is allowed to stand, actual malice can be established by simple evidence of falsity and ill will, without the requisite evidence of the publisher's knowledge of falsity or at least doubts as to the truth of the publication.

This Court's concern for the freedoms given by the first amendment would be undermined by an opinion based on facts contained in the Court of Appeals' decision. The

constitutional rights and freedoms of the petitioner require this Court to review the degree of evidence necessary to establish actual malice and to warrant submission of an issue of punitive damages by a public figure plaintiff.

Subjecting *Overdrive* to the jurisdiction of a North Carolina court under these facts offends the due process clause of the fourteenth amendment, especially since it tends to limit *Overdrive's* first amendment rights.

WHEREFORE, petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-2012

George T. Appleyard, III, *Appellee*,

v.

Transamerican, Press, Inc.,
d/b/a Overdrive, *Appellant*.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem. Eugene A. Gordon, Chief Judge.

Argued March 29, 1976 Decided Aug. 5, 1976

Before HAYNSWORTH, Chief Judge, WINTER and BUTZNER, Circuit Judges.

Larry B. Sitton (Beverly C. Moore, J. Donald Cowan, Jr., Smith, Moore, Smith, Schell & Hunter on brief) for Appellant; Norman B. Smith (Smith, Patterson, Follin, Curtis & James on brief) for Appellee.

WINTER, Circuit Judge:

Transamerican Press, Inc. (Transamerican), defendant in this libel action, appeals from an adverse judgment awarding $10,000 compensatory damages and $5,000 punitive damages to plaintiff, George T. Appleyard, III (Appleyard). We affirm.

I.

Transamerican is the publisher of *Overdrive*, a nationally distributed magazine for truckers. Appleyard originally came into contact with *Overdrive* as part of an effort to change regulations of the Interstate Commerce Commission restricting the carriage of commodities between designated places over designated routes. As a result of conversations between Appleyard and Michael Parkhurst, the editor of *Overdrive*, it was agreed that Appleyard would transport by truck an unauthorized load from Winston-Salem, North Carolina to Washington, D.C. and park this unauthorized load in front of the Interstate Commerce Commission. This action was intended to force the Commission into a test case. Under the initial agreement, *Overdrive* was to finance the costs of litigation either directly or through a legal defense fund that it would establish.

The parties had a falling out, however, over the financing of the suit and the identity of the attorney who was to be employed. As a consequence, Appleyard set up a separate legal fund from that originally established by *Overdrive*. Subsequently, *Overdrive* published two uncomplimentary articles about Appleyard in its January, 1972 issue. The articles falsely suggested that Appleyard had caused the donations to *Overdrive's* defense fund to be diverted to a special bank account established by Appleyard, that some of the funds were diverted to Appleyard's personal use, that some of the funds Appleyard collected went to the personal use of one of Appleyard's associates, etc.

Appleyard then filed this diversity action, claiming that the articles were libelous. The case was tried before a jury, which awarded the plaintiff $10,000 in compensatory damages and $75,000 in punitive damages. On post-trial motions, the district judge remitted the punitive damage award to $5,000.

II

Appellant's first contention is that the district court lacked personal jurisdiction over Transamerican. *In personam* jurisdiction over the defendant in this case is based upon North Carolina General Statutes § 1-75.4(3), which provides for jurisdiction when the case arises out of an act committed in the state by the defendant. Under North Carolina law, a new tortious act occurs each time a libelous publication is read in the state. Johnston v. Time, Inc., 321 F.S. 837 (M.D. N.C. 1970), modified, 448 F.2d 378 (4 Cir. 1971); Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964). Here, the proof showed that copies of the offending articles were sent into North Carolina, and presumably they were read there. Thus, under the applicable long-arm stature, the district court had jurisdiction over the defendant.

However, Transamerican argues that the due process clause of the fourteenth amendment prohibits a North Carolina court from exercising personal jurisdiction over Transamerican in this case. The contention is that Transamerican's connections with North Carolina are so tenuous that requiring it to defend in that state violates the "traditional notions of fair play and substantial justice" which are the touchstones of the due process test for long-arm jurisdiction. *See* International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

Transamerican is the publisher of a magazine of national, albeit small, circulation. Each month 765 copies of *Overdrive* are distributed in North Carolina. This distribution is not accidental, but part of a calculated, ordered program.

Moreover, the articles at issue here were directed at a North Carolina resident, and any damage which misstatements in those articles caused could reasonably be expected to occur in North Carolina. Given these factors, due process standards were not violated by the requirement that Transamerican defend in that state.

III.

Transamerican next contends that there was insufficient evidence to warrant submission of the case to the jury on the issue of liability. Appleyard concedes that he was a public figure at the time that the alleged libel took place. Thus, in order to support the jury's verdict, there must be clear and convincing evidence of actual malice—that is, knowledge of the falsity of statements in the articles or reckless disregard of their truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

One of the statements in the *Overdrive* articles was that "Appleyard had caused the alteration of an appeal for funds in OVERDRIVE, so that donations for the *entire* Legal Defense Fund would be channeled to a special bank account Appleyard set up." (Emphasis in original.) Appleyard testified that he was first informed of the proposed alteration by Jim Drinkhall, an employee of *Overdrive*, and that at that time he expressed his opposition to the change. This testimony provides sufficient support for the jury's general finding that Transamerican published the "articles and statements complained of by plaintiff . . . with actual malice as that term was defined in the instruction," i.e., with either knowledge that the statements were false or reckless disregard for their truthfulness.

IV.

Finally, Transamerican contends that punitive damages

should not be allowed in cases involving public figures. Maheu v. Hughes Tool Co., 384 F.S. 166 (C.D. Calif. 1974), is the only authority to support this position, but we decline to follow it here.[1]

Maheu relied in large part on Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). While *Gertz* held that a "private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury," 418 U.S. at 350, we do not read *Gertz* to hold that a public figure plaintiff may not recover punitive damages if he meets the burden of the *New York Times* test. The concurring opinion of Mr. Justice Blackmun in *Gertz* characterizes its holding only as "removing the specters of presumed and punitive damages in the absence of New York Times malice." 418 U.S. at 354. The dissenting opinion of Mr. Justice White does not treat the majority view as preventing the award of punitive damages where a plaintiff shows "intentional falsehood or reckless disregard for the truth or falsity of the publication." 418 U.S. at 396. While some legal commentators have posited that *Gertz* presages the ultimate abolition of punitive damages for public official and public figure plaintiffs,[2] *Gertz* itself did not do so and

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[1] *Maheu* is of questionable authority also in treating plaintiff as a "public figure plaintiff." *See* Time, Inc. v. Firestone, _____U.S. _____(March 2, 1976). That aspect of *Maheu*, even if not correct, is not directly relevant here.

2 *See* Comment, Constitutional Law-First Amendment-Punitive Damages in Defamation Actions Brought by Public Figures Chill First Amendment Rights and Are Unconsittutional Unless Narrowly and Necessarily Promoting Compelling State Interest, 28 Vanderbilt L. Rev. 887, 897 (1975); D. Robertson, Defamation and the First Amendment: In Praise of *Gertz* v. *Robert Welch, Inc.*, 54 Texas L. Rev. 199, 215 (1976).

this fact has been recognized by other commentators.[3]

Nor do we think that the rationale of *Gertz* is applicable here. The purpose of constitutional limitations on the permissible scope of state-law libel is not to protect false statements of fact. *See Gertz*, 418 U.S. at 340. Rather, the purpose of the *New York Times* rule is to prevent "would-be critics of official conduct (from being) deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times Co.*, 376 U.S. at 279. This rationale has little application where, as in the instant case, *New York Times* malice has been proven; for where such malice is present there is no good-faith attempt to point out real abuses to the public.[4]

There is only an unsubstantiated attack on the character, reputation and good name of a particular individual.

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[3] Comment, Libel and Slander—A State is Precluded from Imposing Liability Without Fault or Presumed or Punitive Damages in the Absence of *New York Times* Malice, 6 Loyola University Law J. 256, 267 (1975); A. Frakt, The Evolving Law of Defamation: *New York Times Co.* v. *Sullivan* to *Gertz* v. *Robert Welch, Inc.* and Beyond, 6 Rutgers Camden Law J. 471, 507 (1975).

[4] Unlike our concurring brother, we find no error in the instructions under which the issue of awarding punitive damages was submitted to the jury. While we would agree that if those instructions stood alone, some of the language employed exceeded the *New York Times* test; but they did not stand alone. The jury was instructed how to determine liability and compensatory damages strictly in accordance with *New York Times*. The jury was further told to consider awarding punitive damages *only* if they found liability and awarded compensatory damages. Thus, any consideration of punitive damages was predicated upon the jury's finding knowing falsity or reckless disregard of the truth. The district court's language strayed beyond *New York Times* only when it sought to impress on the jury that, even if it found knowing falsity or reckless disregard of the truth, it was not required to make an award of punitive damages.

Further, awards of punitive damages advance a valid state goal. Such awards serve to deter others who might engage in malicious false attacks on the public figures. *See generally* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 74 (1971) (Harlan, J., dissenting). Admittedly such figures may have greater access to the channels of effective communication and, hence, a more realistic opportunity to counter-act false statements than private individuals normally enjoy, Gertz v. Robert Welch, Inc., 418 U.S. at 344; however, due to their position in the limelight, public figures are also more likely to suffer from malicious attacks than are private citizens.

This is not a case in which the punitive damage award was excessive in relation to the potential harm inherent in the libelous articles. Such a case might raise first amendment problems because of the inherent chilling effect of such disproportionate awards on vigorous criticism of public officials. *See* Rosenbloom v. Metromedia, Inc., 403 U. S. at 74-75 (Harlan, J., dissenting). Here, punitive damages amounted to only one-half of compensatory damages. We see no constitutional infirmity in such an award.

AFFIRMED.

BUTZNER, Circuit Judge, concurring:

I concur in the court's opinion, but I believe these additional remarks are warranted because of the instructions given by the district court to the jury on the issue of punitive damages.

In Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974), the Court held that a private citizen could recover punitive damages only when a publication was made with "knowledge of falsity or reckless disregard for the truth." This standard, at the very least, is applicable to the recovery of punitive damages by a public figure. *See* Eaton, The

American Law of Defamation, 61 Va. L. Rev. 1349, 1439-41 (1975).

The district court charged the jury in conformance with New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964), that compensatory damages could be awarded to a public figure only if the defamatory statement were made "with knowledge that it's false or with reckless disregard of whether it was false or not." It did not, however, repeat this admonition in its instructions on punitive damages. Instead, it said in part that punitive damages could be awarded if the defamation were "carelessly published." The court further emphasized that such damages were permissible if the defamatory publication were "intentional, malicious and with the purpose of injuring the Plaintiff." These instructions erroneously departed from the proper standard because they allowed recovery of punitive damages without proof that the defendant knew the defamatory statements were false or that it made them with reckless disregard of their truth or falsity. *Cf.* Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6, 9-11 (1970); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967).

Although the defendant objected to the submission of the issue of punitive damages to the jury, it did not comply with Rule 51 of the Federal Rules of Civil Procedure by objecting to the court's test for the recovery of such damages. Most circuits have said that an appellate court may reverse for plain error where necessary to prevent a miscarriage of justice despite the defendant's failure to comply with Rule 51. Edwards v. Mayes, 385 F.2d 369, 373 n. 1 (4th Cir. 1967); 9 Wright and Miller, Federal Practice and Procedure § 2558 at 672 (1971). The protection of first amendment rights or the prevention of an improper award of punitive damages particularly justifies the application of the plain error rule.

Williams v. City of New York, 508 F.2d 356, 363 (2d Cir. 1974); Founding Church of Scientology v. United States, 409 F.2d 1146, 1164 n. 2 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

In this case, however, upholding the award of punitive damages does not intrude on the defendant's first amendment rights. For the reasons stated in Part III of the court's opinion, I agree that the evidence shows that the defendant published the defamatory articles with knowledge that they were false or with reckless disregard of whether they were false or not. Since the award of punitive damages is supported by substantial evidence under the proper standard, we need not apply the plain error exception to Rule 51. *Cf.* Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967).

JUDGMENT OF THE HONORABLE EUGENE A. GORDON, DISTRICT JUDGE, DATED 15 JULY 1975

THIS CAUSE, coming on to be heard and being heard before the undersigned United States District Judge and a jury; and the issues having been submitted to and answered by the jury, as follows:

1. Was the publication complained of by plaintiff false in some material particular?

Answer: Yes.

2. Were the articles and statements complained of by plaintiff published with actual malice as that term was defined in the instructions?

Answer: Yes.

3. What amount, if any, is plaintiff entitled to recover of defendant for actual or compensatory damages?

Answer: $10,000

4. What amount, if any, is plaintiff entitled to recover of the defendant for punitive damages?

Answer: $75,000.

Upon receipt of the verdict, defendant moved for entry of judgment notwithstanding the verdict, and alternatively, for a new trial. Defendant filed written pleadings and brief setting forth its grounds for these motions. A responsive brief was filed by plaintiff. Oral argument was heard. Upon consideration of the motions, the briefs of the parties, and argument of counsel, the Court concluded that defendant's motion for judgment notwithstanding the verdict should be denied, and that defendant's motion for new trial should be denied, except for a new trial on the issue of punitive damages, the Court being of the opinion that the jury returned an excessive verdict on the issue of punitive damages. The

Court determined that unless plaintiff shall consent to a remittitur of all punitive damages above the sum of $5,000, defendent's motion for new trial on the issue of punitive damages would be granted. By the consent to this judgment, plaintiff has agreed to remit all punitive damages above the sum of $5,000.

It is now, there,

ORDERED, ADJUDGED, AND DECREED, that defendant's motion for judgment notwithstanding the verdict and for new trial, be and the same are hereby denied; that plaintiff have and recover the sum of $15,000.00 from defendant, together with interest thereon from date of judgment, and the costs of this action as taxed by the clerk.

This 15 day of July, 1975.

/s/ Eugene A. Gordon
United States District Judge

CONSENTED TO:

/s/ Norman B. Smith
Attorney for Plaintiff
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CHICKENS-ALWAYS-COME-HOME-TO-ROOST-DEPT.

. . . "Just Daddy an' Me"

On September 26, 1971, George T. Appleyard The Third prepared a two-page letter to the contributors – some of them – of his "Legal Defense Fund."

We will not comment too harshly on his letter because we think the following quotations from the letter itself are ample evidence as to what has taken place over the past year and a half.

"There might be some confusion as to why my legal fund was in Washington and is not in Clemmons." (North Carolina – Editor's Note.)

"Only a few truck brokers collected money and, *believe it or not* (italics ours – Ed.), only one truck broker sent any in."

"I closed out the account in March of this year and below is a record of the money that came in and how it was spent."

"Contributors to the fund in Washington will not get a copy of this letter because the bank kept no record of their addresses."

"This spring I started the Appleyard Legal Fund up again using my own address and a local bank. MY FATHER DEPOSITS THE MONEY IN A SPECIAL ACCOUNT AND WRITES THE AMOUNT ON THE ENVELOPE, SO WE HAVE A RECORD WITH EACH CONTRIBUTOR'S ADDRESS AND I CAN KEEP A CHECK ON IT. THIS SYSTEM WORKS BETTER AND IS FREE. BUT OF COURSE SOME PEOPLE WILL BE DISTRUSTFUL SINCE IT'S ALL IN THE FAMILY."

"All I can say is if you don't trust me and Daddy, just don't send any money." (Ed. note: We won't.)

"Don't any of you folks worry about loading me up with too much money."

"The first two checks were for postage to mail Jim Cain's bulletin." (Ed. note: $367.)

"Not enough was sent to do the job but the contributors received an accounting of that money. The checks for $10.00 and $22.68 were for getting stuff printed that went out to the truck brokers."

(ED. NOTE: Although Appleyard screamed his lungs out from truck stop to truck stop about the necessity of having a "Trustee Account" he now conveniently finds this no longer necessary since his daddy writes the amounts of the contributions on the back of the envelopes, a filing system we are sure is as accurate as his accounting of the money. We think it is interesting to note that it took over a year for Appleyard to come up with any sort of "accounting" and that, of course, is unaudited. Equally interesting is his admission that the first checks went to Jim Cain – who, by the way, never reported that income in his own so-called accounting. But, since Appleyard is his own "Trustee" there won't be any accounting expense, something that Appleyard obviously thinks is unnecessary – especially with Daddy around.)

The Worm In The Appleyard *(Publicity-Hungry George Appleyard Reveals True Color To Be Yellow-Not-So-Delicious)*

PART I

In the summer of 1969, OVERDRIVE asked for – and got – a "volunteer" to test the Constitutionality of the Interstate Commerce Commission.

OVERDRIVE purchased a trailerload of chipboard which was to be delivered to Los Angeles. According to the rules of the I.C.C., *only* a certificated carrier could carry the load – or any load of "regulated" freight. But OVERDRIVE wanted to test the legality of this rule, and we had to have a way to get the publicity needed to alert a lot of people in Washington about the situation.

OVERDRIVE's reasoning is easy to understand. We reason that if the price of virtually everything (until the so-called price freeze, that is) is on an open market – the price of shoes, the cost of shoe shine, the shipment of the majority of everything people eat – well, why not lift the restrictions on common freight, too? After all, an IBM sells for a different price than a Remington or an Olympia typewriter, *so why not use the same logic in shipping general freight?* It works with produce. It works with cattle. It works on the stock market. And it works for thousands of other items, as well; and, *in spite of the*

American financial system, we are still the soundest country in the world. In fact, **the countries that exert the most control over prices for goods and services are the countries with the Communistic form of government.** Ironically, about 38% of the nation's truck lines – those which already have their "rights" to haul file cabinets and toothpicks – want to keep their monopoly on the nation's ground transportation system.

But *the only way to change an unfair law is to stir up the necessary publicity*, to make people aware of the *need* for a change.

Thus, in the late summer of 1969, OVERDRIVE placed a large advertisement in Washington's leading newspaper, proclaiming the arrival, in Washington, of a trailerful of goods which were "hot freight" according to the slang of the I.C.C. and truckers, generally.

We sent certified letters to all eleven members of the Interstate Commerce Commission, and invited the I.C.C. to cause the arrest of the trucker we had paid to haul the alleged illegal load – a trucker in fact, we had paid several hundred dollars to, in order to get him from North Carolina to Washington.

That trucker is named George Appleyard, though he prefers to be called "George Appleyard The Third." George is quite proud of his family name. His father, George Appleyard The Second, is the "treasurer" of the George Appleyard "fund" which is, in reality, one of the personal bank accounts of George Appleyard the Third.

But, excuse, please – we're getting ahead of our story!

Meanwhile, back in Washington, George Appleyard's arrival at the I.C.C. was greeted by none of the I.C.C. Commissioners who were all conveniently "out" for the day.

However, we had engaged the services of a local attorney who we felt was necessary to make sure George didn't say anything out of line to the folks at the I.C.C.

Shortly thereafter, the I.C.C. decided to prosecute George in his home state. You see, the I.C.C. had never seen anything like this before, and they felt they could avoid the publicity if they shunted the case to George's backyard.

At that time, OVERDRIVE ROADMASTERS had an employee of three months by the name of Jim Cain, whom we had sent to Washington to hold George Appleyard's hand, so to speak. We didn't believe it would develop into the "romance" that bloomed shortly thereafter, of course.

Shortly after this episode in Washington, Cain set up a non-existent organization through a post office box in Georgia, unbeknownst to OVERDRIVE, and, weeks later, Cain swiped the mailing lists of OVERDRIVE ROADMASTERS as well as another mailing list of subscribers to OVERDRIVE.

BOSOM BUDDIES

In the meantime, through his newly found bosom buddy, (Cain) Appleyard had caused the alteration of an appeal for funds in OVERDRIVE, so that donations for the *entire* Legal Defense Fund would be channeled to a special bank account Appleyard had set up. Naturally, no one noticed the change in the layout department of OVERDRIVE, since it was done after the final "pasteup" was finished.

The next step in Appleyard's little scheme was to make it appear that OVERDRIVE had "stolen" the Legal Defense Fund. Actually, Appleyard wasn't quite that cunning, so his "pal" Cain led the way with a bulletin blasting OVERDRIVE, and suggesting that Mike Parkhurst had stolen thousands of dollars from the poor, unsuspecting trucker.

Because of the uproar over the Legal Fund, OVERDRIVE decided to drop the Fund entirely. After all, we had existed quite nicely without it for years, and still had managed – without any fund at all – to spend more than $50,000 on attorney fees in less than three years, all for the defense of various causes for truckers or the trucking industry.

However, you'll recall that the altered page in OVERDRIVE had caused some money to flow directly into Appleyard's wallet.

Now, the man called Cain had caused to be printed a long and slanderous bulletin about OVERDRIVE, and in his bulletin he said he had started a new "honest" organization that was going to really help truckers. (Not like that crooked OVERDRIVE!)

At the same time, of course, the Teamsters were having a ball, and various other magazines (one of them heavily supported financially by the Teamsters Union, we later discovered) started taking pot shots at OVERDRIVE.

Pretty soon, with two or three magazines printing all the lies fed them by Cain, Appleyard and/or the Teamsters Union, word spread that OVERDRIVE had "left Appleyard out on a limb."

What had really happened, of course, was that Appleyard had refused to allow himself to be represented by the attorney that we had selected. He had already circulated a bulletin blasting OVERDRIVE, so he couldn't "lose face" by accepting our offer to support him if he only would use some common sense and accept our attorney.

But he wouldn't. And, since Cain and Appleyard were already buddy-buddy, it behooved them both to smear OVERDRIVE as much as possible, especially since Cain had "started" a new organization after he secretly folded the Georgia-based one.

So there we were . . . Appleyard going around the country tacking up his bulletins asking for money, and Cain proclaiming his "honesty" in every letter.

Appleyard claimed all the money should be used to defend his case, and one of his biggest "arguments"

was that OVERDRIVE had used the Legal Defense Fund to finance "Moonfire."

The fact that the film's **weekly** crew payroll was *twice* what the *entire Legal Fund had received in two years*, didn't seem to bother old George. He still went around tacking up his bulletins.

But what did George do with the money he got first? Did he pay the attorney? No sir . . . **he sent it to his pal Jim Cain who then used the money to send out the slanderous bulletins about OVERDRIVE.**

That's right – **almost 40% of the entire amount collected by Appleyard went directly into Jim Cain's pocket!** For the record, Jim Cain did not report this "contribution" in his own list of "contributors." Now there's an oversight for you!

Here, in a nutshell (and that is the most accurate term we could think of) is the situation . . . Appleyard could not lose face and accept the attorneys OVERDRIVE recommended. He had put himself out on a limb. He never answered our letter appealing to him to listen to some sound advice . . . this in spite of the fact that he had already put out a slanderous bulletin. The problem was, however, that the case read *"I.C.C. vs. Appleyard, Parkhurst and Cain."*

Therefore, in order to defend Appleyard, personally, *OVERDRIVE would also have to defend Cain!* **But both Appleyard and Cain would not allow themselves to be defended by OVERDRIVE's attorney!**

So the case throbbed in the North Carolina courts until recently, when Appleyard and Cain decided they would show their true colors – which, in our opinion, they had been doing all along anyway.

What did Appleyard do? He simply pleaded *"INNOCENT"* because, said he, OVERDRIVE had put him up to it, and it wasn't really his fault . . . **he was just acting as an agent for OVERDRIVE and Mike Parkhurst, so, please, I.C.C., please don't prosecute!**

That's not the exact wording, of course, but that is what Appleyard's plea amounts to.

THE HEARINGS – AND NOW

What of the actual "case" itself? What is the status?

What has happened is this: OVERDRIVE has told the I.C.C. that we will not conspire with Appleyard again. *That's the understatement of the year.*

Appleyard has said that he is innocent by reason of being an agent for OVERDRIVE!

There has been no *final* ruling on Appleyard, but we would guess (based on hundreds of cases of truckers in the past who have been found guilty of violating I.C.C. law) that he will be fined somewhere between $300 to $500 and he will have a permanent injunction filed so that, if he is caught again violating that portion of the I.C.C. rules, the I.C.C. will have the power of the Federal Court behind them to enforce an even stiffer fine, or, perhaps, jail sentence.

The whole Appleyard-Cain conspiracy did nothing except muddy the waters. Now that the mud has settled to the bottom, where it belongs, let's look at what has happened to the main thrust of our case in the first place . . . *the real reason for the use of Appleyard.*

As he was told in the very beginning, Appleyard might face a permanent injunction by the Government. He might be fined. He might even lose his truck. But Appleyard didn't care, and, in fact, had told us months before the original load was hauled, that he was tired of trucking and wanted to start a brokerage business, anyway. Appleyard went into the case with his eyes open, fully informed.

But getting one's picture in OVERDRIVE several times, as well as your truck on the cover (of a $2 issue!) can do something to some people. George Appleyard apparently does not have the mentality to cope with all the publicity.

As to the heart of the matter, OVERDRIVE is convinced that more good has come of the publicity kicked off by our original ad in the Washington Post and surrounding articles in OVERDRIVE than we originally hoped for.

Our premise was that *the I.C.C. should be limited in its rate-making powers, and, in fact, should be eliminated altogether, at least in rate-making capacities.*

We wanted Washington, D.C. to know about the situation, and we wanted the Powers That Be in Washington to take a long, hard look at the entire situation.

So what has happened?

Today, the Secretary of Transportation, John Volpe, has advocated – and advocated strongly – that the rate-making powers of the Interstate Commerce Commission be abolished.

There are now some strong voices in Washington who have been informed as to the abuses of the regulatory monopoly that currently exists, and the Nixon Administration has declared – openly – in favor of curtailment of the regulatory powers of the I.C.C.

Did OVERDRIVE "help" this cause?

You can answer that question in the privacy of your home, the comfort of your sleeper, or in open discussion among truckers at any truck stop. Before you answer the question, think about these additional facts:

(1) At no time since the I.C.C. was formed in the late 1880's has there ever been the kind of opposition to their power as there exists today.

(2) OVERDRIVE has become increasingly well-known among Congressmen and Senators who want to dig a little deeper than the varnish on the desk tops of the bureaucrats at the I.C.C.